Human Rights Brief

Volume 6 | Issue 2 Article 11

1999

Discrimination Under Law: The Solomon Amendment

Sean Roaney
American University Washington College of Law

Discrimination Under Law: The Solomon Amendment

*by Sean Roaney**

Recently, many law schools in the United States were jostled by an unpleasant realization: the price of principles can be inordinately taxing. For these schools, this unwelcome revelation is attributable to the passage of the Solomon Amendment (amendment) of the Omnibus Consolidated Appropriations Act of 1997. Passed in 1996, the amendment, in essence, disallows educational institutions, including law schools, from receiving federal funds if they do not allow the U.S. military to conduct employment recruitment programs on their campuses, despite many law schools' objections to the U.S. military's discriminatory policy that ban gays and lesbians from serving.

Sponsored by U.S. Representative Gerald Solomon (R-NY), the amendment provides, in pertinent part, that "[n]one of the funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for any fiscal year may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered educational entity if the Secretary of Defense determines that the covered educational entity has a policy or practice (regardless of when implemented) that either prohibits, or in effect, prevents . . . access by military recruiters for purposes of Federal military recruiting. . . ." The amendment, therefore, effectively denies aid to law schools that bar the U.S. military from recruiting on their campuses as a result of its discriminatory policies.

The amendment comes as a response, in part, to the dissatisfaction of many law schools with the military's current policy of discriminating against homosexuals by prohibiting them from serving in the armed forces. In objection to this discriminatory policy, numerous U.S. law schools once prohibited military recruiters from meeting with students on their campuses. In response to these efforts to stymie the military's recruiting efforts, Representative Solomon initially sponsored legislation in 1994 that deprived schools barring on-campus military recruitment from receiving Department of Defense (DOD) funds or contracts. Then, in 1997, he offered a broader amendment that encompassed monies from other federal agencies, including the Departments of Education, Energy, Transportation, and Health and Human Services. This became the Solomon Amendment to the 1997 omnibus bill. Under the current version of the amendment, if the DOD identifies a law school or other educational institution that prohibits on-campus military recruitment and, thus, is in violation of the amendment, that school is liable to forfeit federal grants, including Perkins student loans and work-study monies. Federal funds that are distributed directly to students, such as Pell grants, are not affected.

The amount of money at stake is not insignificant. For example, as the American Bar Association reported in 1996, the average U.S. law student receives approximately U.S. $82,800 in federal loans or work-study funding. The Harvard University School of Law, furthermore, reports that it could lose U.S. $1 million annually for noncompliance with the Solomon Amendment. Similarly, the Stanford University School of Law could lose roughly U.S. $500,000 per year, and the Duke University School of Law could forfeit approximately U.S. $600,000 each year.

Thus, the amendment squarely places before U.S. law schools an issue of severe gravity: whether the price of laudable convictions protesting the military's discriminatory policy is worth the hefty cost of losing valuable federal financial aid and jeopardizing the education of innumerable students. Representative Solomon insists that the amendment was simply the result of military necessity and pragmatism. "The readiness of our armed forces is on the wane," he stated, implying that the U.S. military requires access to universities and law schools to meet its personnel needs. Additionally, he characterized the amendment as an issue of equity. "I say fair is fair . . . . If [schools] want to accept the offering from their government, then they certainly should let their government come onto their campuses, the same as they do to other private sector corporate interests."

Opponents of the amendment, however, see things differently. To many critics, forced compliance with the amendment effectively chills the atmosphere of free thought vital to the vigorous exchange of ideas and perspectives in an academic forum. As Pamela B. Gann, Dean of the Duke University School of Law asserts, "[i]t is of paramount importance for law schools, and universities in general, to create a welcoming environment for all students, regardless of race, gender, creed or sexual orientation. A core value of the university is the free and open exchange of ideas and the right of every student, regardless of viewpoint or background, to pursue an education in a supportive environment."

The Association of American Law Schools (AALS) grappled with the enormous consequences of both compliance and noncompliance with the amendment and emerged with a conclusion that sought to effectuate the most judicious compromise available. Previously, it had drawn up a memorandum, distributed to its member schools in August 1990, in which it adopted a policy prohibiting discrimination on the basis of sexual orientation. Pursuant to this policy, the AALS promulgated a regulation providing that its member law schools must require any on-campus recruiters—government or private—to certify that they do not discriminate against gays and lesbians. Recently, though, in response to the amendment's potential consequences for schools' funding, the AALS amended this regulation by excusing law schools from compliance with respect to military recruiters. That is, an AALS law school is allowed to comply with the amendment by permitting military recruitment on campus, so long as the school's administration officially expresses disapproval of the military's policy of discrimination against homosexual servicemembers and as long as the school provides a "safe and protective atmosphere for gay and lesbian students."

Not everyone involved finds this an equitable accommodation, however. Winnie Stachelberg, of the Human Rights Campaign, a lesbian and gay civil rights group, remains skeptical. "Unfortunately, maybe the dollar is more important than the principled approach. I would like to say that the price of a principle should be higher than a student's loans." Other opponents of the amendment are less diplomatic. After the administration of American University's Washington College of Law (WCL) grudgingly complied with the amendment by allowing military recruiters on its Washington, D.C., campus, the *City Paper*, a local independent newspaper, sharply denounced the move. Its headline screamed "Push comes to shove, and the American University faculty decides discrimination is OK after all."

The future of the amendment will largely turn upon the constitutionality of the military's prohibition against homosexuals in the military. To date, however, several U.S. circuit courts of appeal have deemed the military policy to be constitutional, and the U.S. Supreme Court has not yet been presented with a case challenging the measure.

Further clouding the amendment's future is the fact that certain states, including virtually every state in the northeastern

continued on page 29

Solomon, continued from page 21

United States, have enacted state civil rights legislation banning discrimination against gays and lesbians. Compliance with the amendment, therefore, requires that law schools in these states directly contravene their own state law. As Representative Solomon opines, however, these laws are of little importance. These states, he reasons, can merely amend their legislation to allow for military recruitment. Amendment opponents do not find this a palatable option, however, and continue to hope that the Supreme Court will eventually overturn the military policy.

Although the amendment's future remains unclear, protests against it are likely to continue in courts and at law schools. The AALS, for example, has indicated that it will file *amicus curiae* briefs in litigation brought by law schools concerning the amendment. At individual law schools, both faculty members and students are also demonstrating a tenacious desire to overturn the military's discriminatory policy, which is widely denounced as unjust and unconstitutional. At the University of Oregon School of Law, for example, roughly 150 students protested the presence of military personnel who had come to the school for recruitment purposes. Similarly, WCL faculty and students distributed protest ribbons and reading material concerning the military's policy of discrimination against lesbian and gay members when the military was conducting on-campus recruitment there. Reports indicate that the issue continues to resonate strongly with law students across the country, who persevere in their work towards the amendment's repeal and the end of the U.S. military's discriminatory policy against gays and lesbians.

Sean Roaney is a second year J.D. candidate at the Washington College of Law.

Bar Applicants, continued from page 5

ing compensatory damages of $12,500 (the cost of her unaccommodated bar examinations), but the basis for its decision was somewhat unusual. The court concluded that the plaintiff was not substantially impaired in the major life activities of reading and learning—the most obviously affected major life activities—because her performance of these activities was not demonstrably worse than that of the average person without a disability. The plaintiff was able to read and learn at the level of the average person in the general population because she had developed "self-accommodating" strategies and techniques that compensated for her learning disability. However, the court held that she was impaired in the major life activity of working because the ADA regulations look to a different comparison group (persons of comparable training, experience, and ability, *i.e.*, bar applicants without reading disabilities), not the average person in the general population, when examining the major life activity of working. This reading of the statute was creative but not unproblematic, because (1) the regulations prevent courts from reaching the major life activity of working until they have examined all other major life activities, and (2) the court had to construe the bar examination to be, in essence, an employment test, failure on which would prevent the plaintiff from ever working as a lawyer. This statutory interpretation was intriguing but far from obviously correct.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the trial court's judgment that the defendants had violated the ADA and Section 504 of the Rehabilitation Act, but employed a different rationale. It held that it was unnecessary for the trial court to reach the issue of whether the plaintiff was substantially limited in the major life activity of working because she was substantially limited in the major life activities of reading and learning. Relying on legislative history, a related Equal Employment Opportunity Commission (EEOC) interpretive guidance, and judicial precedent from other federal courts, the appellate panel held that the trial court should not have considered the mitigating effect of the plaintiff's "self-accommodation" reading techniques when determining whether she had a disability. Although there was jurisprudential support for the court's determination, other courts have refused to follow the EEOC guidance and legislative history that discount the role of mitigating measures in the determination of disability. It is likely that the Supreme Court will be faced with this issue in the next few years.

The Second Circuit also rejected the board's policy of using the plaintiff's scores on an *untimed* diagnostic test to determine if she had a disability that would impair her performance on a *timed* bar examination. It ruled that the expert's cut-off score was not supported by the evidence, which showed that one-third of adults with the same disability scored above the cut-off score on similar diagnostic tests. The court concluded that the defendant's policy of using its expert's diagnostic methodology "constituted deliberate indifference to a strong likelihood of violating [the plaintiff's] federally protected rights" and affirmed the order of injunctive relief, while remanding for a recalculation of compensatory damages.

The plaintiff did not pass the New York bar examination despite receiving the requested accommodations and plans to re-take it. If she is again unsuccessful after getting appropriate accommodations, it could be fairly said that she has not demonstrated her qualifications to practice law in New York. This outcome, while unfortunate for the plaintiff, would at least belie the criticism that the ADA supposedly and inevitably results in the lowering of academic, professional licensing, and employment standards. For, as the Second Circuit wrote in *Bartlett*, "The ADA and the Rehabilitation Act do not guarantee [the plaintiff] conditions that will enable her to pass the bar examination—that she must achieve on her own. What Congress did provide for, and what the Board has previously denied her, is the opportunity to take the examination on a level playing field with other applicants."

Conclusion

Despite the legal victory in *Bartlett*, plaintiffs with disabilities are still caught between the rock of their disability and the hard place of qualification. If their disabilities are not considered substantial enough, as the board of law examiners, expert in *Bartlett* originally determined, the ADA does not protect them. On the other hand, if their disability is substantial, they may not be able to meet the necessary qualifications for the position or status they seek. More broadly, however, professional licensing cases like *Bartlett* compel society to take seriously the obligation to grant to all its members the opportunity to participate fully in the activities of daily life for which they are qualified. Denial of such opportunities represents the denial of basic human rights protected in international instruments like the UDHR and the UN Declaration on the Rights of Disabled Persons. *Bartlett* stands for the proposition that, in the United States, such a denial is not only unwise, but is also illegal.

Edwin R. Hazen is the Director of Student Counseling at the Washington College of Law. Robert D. Dinerstein is Professor of Law and Associate Dean for Academic Affairs at the Washington College of Law.